UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:05-bk-15856-ALP
Chapter 7 Case

A. STEVEN BUONOPANE,

Debtor
_____/

ORDER ON DEBTOR'S MOTION TO ALTER OR AMEND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT
(Doc. No. 65)

THIS IS the second occasion this Court is called upon to consider a challenge by Diane Jensen (Trustee) of the right of the Debtor, A. Steven Buonopane, (the Debtor) to enjoy the full constitutional protection accorded to the Florida homestead by Article X, Section 4 of the Florida Constitution. On the first occasion, the Trustee contended that the property located at 879 Meadowland Drive, Naples, Florida, 34108 was acquired by the Debtor within 1,215 days prior to the commencement of his Chapter 7 case, thus the amount placed on the right to claim an unlimited immunity of the Florida homestead is now, by virtue of Section 522(p) of the Code, is limited to $125,000. In opposition to the Trustee's challenge, the Debtor contended that subsection (p) of Section 522 does not apply in the State of Florida and, therefore, it has no impact on the Debtor's right to claim the unlimited homestead exemption guaranteed by Article X, Section 4 of the Florida Constitution.

In support of this proposition, counsel for the Debtor relied on the provision in Section 522(p), which provides that the claim of exemption which could be made is, "as a result of electing." According to counsel for the Debtor, debtors in Florida do not have a right to elect between the federal and state exemption, because Florida opted-out from the right to elect between the Federal Exemptions established by Section 522(d) and the exemptions available under state law, which in Florida is limited to the exemptions available under Article X, Section 4 of the Florida Constitution and the statutory exemption, Section 222.01 *et seq.* of the Florida Statute. In addition, counsel for the Debtor relied on the case of In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005). In In re McNabb, the Bankruptcy Court held that subsection (p) of Section 522 does not apply in States which opted-out because in those States the debtors do not have a right to elect between federal and state exemption

The issue of the applicability of subsection (p) of Section 522 in opt-out States such as Florida has been extensively litigated since the decision in McNabb, and Bankruptcy Courts which considered this issue have uniformly rejected the decision of McNabb. *See* In re Kane, 336 B.R. 477, (Bankr. D. Nev. Jan. 2006) (holding the provision of the Code was designed to close "the 'millionaire's mansion' loophole in the current bankruptcy code that permits corporate criminals to shield their multi-million dollar homesteads."), *See also* In re Kaplan, 331 B.R. 483(Bankr. S.D. Fla. 2005); In re Virissimo, 332 B.R. 201(Bankr. D. Nev. 2005); and In re Landahl, 2006 WL 506034 (Bankr. M.D. Fla.).

This Court, having considered the argument of counsel at the hearing on the Motion for Partial Summary Judgment, concluded that subsection (p) does apply in Florida, notwithstanding the language in the subsection "as a result of electing," and granted the Trustee's Motion for Partial Summary Judgment (Doc. No. 52).

The specific and discrete issue presently before this Court involves the Debtor's contention that, even assuming without conceding that subsection (p) does apply in Florida, whether it controls the debtor's rights to claim the unlimited exemption guaranteed by Article X, Section 4 of the Florida Constitution based on the undisputed facts of this case, which are as follows.

The Real Property involved in this controversy had been acquired sometime before December 28, 2004, by the Todd-Rae Realty Trust (Trust) a Trust established under the laws of the State of Massachusetts on July 17, 2000. The beneficiaries of the Trust were the Debtor and his non-debtor spouse. On December 28, 2004, Kathleen Buonopane, as Trustee of the Trust, conveyed the ownership of the property by Warranty Deed to the Debtor and to herself, as tenancy by the entirety. On the same date, the Debtor and his wife also filed a Declaration of Domicile indicating the Real Property described above was their permanent home and their predominant residence. It is undisputed that prior to the conveyance of the Real Property on December 28, 2004, the Debtor's interest in the Trust was of a beneficiary of the

Trust, which under the applicable laws of this State is sufficient to support a homestead claim. As stated in the case of Doing v. Riley, 176 F.2d 449 (5th Cir. 1949) the Court recognized the general proposition announced by Bessemer Properties Inc. v. Gamble, 27 So. 2d 832 (Fla. 1946) that the right of possession or any beneficial interest in property is sufficient to claim the Florida homestead exemption. This brings to play the consideration of subsection (p)(2)(B) which provides, the limitation of the debtors' right to claim exemptions under Florida law would not apply if the interest in the current homestead was transferred from a debtors' previous principal residence, which was acquired prior to the beginning of the 1,215-day period, if the debtors' previous and current residence are both located in the same State.

This Court takes judicial notice of the fact that the Debtor under oath stated in his Statement of Financial Affairs, in answering question fifteen, that during July 1985 through February 2004, the Debtor resided at 150 Shawsheen Road, Andover, MA. and then he resided at 300 Lynn Shore Dr., Lynn, MA. during February 2004 through March 2005. It should be evident from the foregoing that at the time the Debtor acquired his equitable interest in the subject property the property was not his principal residence.

The Debtor filed his Petition for Relief under Chapter 7 on August 10, 2005. It is clear from this record that while the Debtor held an equitable ownership interest in the subject property located in Florida, which would have supported his homestead claim, although none was claimed. It is clear from the record that the subject property was not his principal residence until he moved to Florida sometime during March 2005 or six (6) months prior to the commencement of his Chapter 7 case.

It is evident from the foregoing that the Debtor's reliance on Section 522(p)(2)(B) is misplaced, and, therefore, the Debtor's equity in the subject property is limited to $125,000. Based on the foregoing, this Court is satisfied that the Debtor's Motion to Alter or Amend Order on Motion for Partial Summary Judgment is without merit and should be denied.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Alter or Amend Order on Motion for Partial Summary Judgment (Doc. No. 65) be, and the same is hereby, denied. It is further

ORDERED, ADJUDGED AND DECREED that the Trustee's Objection to Debtor's Amended Claim of Exemption be, and the same is hereby, sustained.

DONE at Tampa, Florida, on 6/1/06.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
United States Bankruptcy Judge